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CITATIONS

Case:

Jane Holding Corporation v. *Helvering*, No. 999, October Term, 1939, certiorari denied June 3, 1940, petition for rehearing filed June 21, 1940 ..... 3, 7, 8,

Statute:

Revenue Act of 1932, c. 209, 47 Stat. 169:

Sec. 22 2

Sec. 42 3

245766—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

EDWARD MALLINCKRODT, JR., ET AL., TRUSTEES, ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above cause on April 18, 1940, reversing the decision of the United States Board of Tax Appeals.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 40–68) is reported in 38 B. T. A. 960. The opinion of the Circuit Court of Appeals (R. 523–544) is reported in 109 F. (2d) 933.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 27, 1940. (R. 546.) On motion of the Government (R. 567–568) to correct the judgment entered, that judgment was set aside on April 18, 1940 (R. 569–570), and a new judgment was entered on that day (R. 570–571). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent, a Trust, was the sole stockholder of Jane Holding Corporation. The Trust, which reported income on a cash basis, had loaned money to the Corporation, which kept its books on the accrual basis. The question is, whether the Trust constructively received income of $171,243.36 in 1932, which amount was credited to the Trust on the books of the Corporation as interest payable to the Trust in that year, and was deducted as interest by the Corporation on its income tax return for 1932.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for

personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 42–48) may be summarized as follows:[1]

In 1918 Edward Mallinckrodt transferred to certain trustees, for the benefit of his wife and children, all of the outstanding shares of stock of the

[1] This case was heard below, together with *Helvering* v. *Jane Holding Corporation*, on a single consolidated record. A petition for certiorari in that case (*sub nom.*, *Jane Holding Corporation* v. *Helvering*) was denied June 3, 1940, No. 999, 1939 Term, and is now pending on a petition for rehearing filed June 21, 1940.

Jane Holding Corporation, hereinafter referred to as the Corporation. (R. 42–43.) Since then the trustees have held all the shares of capital stock of the Corporation. (R. 43.)

The primary purpose of creating the Trust was to finance the construction and operation of a building. (R. 43.) During the period 1918 to 1931 the trustees and the trustor made loans to the Corporation for the financing of the building and other purposes. In 1922 the trustor transferred to the trustees his claims for direct advances theretofore made by him to the Corporation. The total amount of the loans from 1918 to 1931, inclusive, was $3,842,-131.65. (R. 43.)

The Corporation kept its books of account and filed its income tax returns for the years 1919 to 1933, inclusive, on the accrual basis. (R. 43.) Each year from 1919 to 1932, inclusive, the Corporation set up on its books of account liability for accrued interest on the money advanced to it, and deducted the accruals of interest in its income tax returns. (R. 44.) The total accrued interest set up on its books up to December 31, 1932, was $2,510,222.07. (R. 44.)

The Trust kept its books of account and filed its income tax returns for the years 1920 to 1933 on a cash receipts and disbursements basis. (R. 44.)

Beginning in 1920 the Corporation made payments to the Trust on the indebtedness. No designation was made on the books of the Corporation

as to whether these payments were to apply to principal or to interest. The Trust treated the payments as payments of principal, and did not include them as income on any of its income tax returns for any year. (R. 44–45.)

The Corporation annually accrued the amount of interest due the Trust and for the year 1932 the Corporation accrued interest payable to the Trust on its books in the sum of $171,249.36. In that year the Corporation paid to the Trust $160,000. (R. 45.)

There were no substantial limitations or restrictions as to the time or manner of the payment of the interest of $171,249.36 which the Corporation credited on its books to the Trust in the year 1932. The Trust's failure to collect and receive such interest in cash in the year 1932 was due to its own choice and was not a matter of necessity. (R. 45.)

As of May 27, 1933, the Corporation had repaid to the Trust $3,462,003.89. Under the Trust's method of handling the payments there was due at that time $2,890,349.83, of which $380,127.76 represented principal and $2,510,222.07 represented accrued interest. (R. 45.)

In 1933 certain beneficiaries of the Trust requested the trustees to disburse to them income of the trust estate. The trust instrument provided that the income of the Trust should not be disbursed until the amounts borrowed by the Corporation had been repaid. For this reason, in order to make

the income of the Trust available to the beneficiaries, the indebtedness of the Corporation to the Trust, in the amount of $2,890,349.83, including both principal and interest, was cancelled and forgiven by the trustees as of December 30, 1933. (R. 45–47.)

The Commissioner increased the income reported by the Corporation for the year 1933 by adding $2,510,222.07, representing the amount of the interest indebtedness cancelled by the trustees. (R. 48.)

The Commissioner also increased the income reported by the Trust for the year 1932 by adding $171,249.36, which was the amount of interest accrued as of December 31, 1932, by the Corporation on its books and credited to the Trust on that day, and deducted by the Corporation in its income tax return filed for that year. (R. 48.)

The cases were consolidated for hearing and the Board of Tax Appeals, two members dissenting, held that the cancellation of the interest indebtedness of $2,510,222.07 was not taxable income to the Corporation, but was a contribution of capital. (R. 54–56.) The Board of Tax Appeals further held, one member dissenting, that the interest of $171,249.36 was taxable income of the Trust. (R. 56–59.)

The Government appealed in the Corporation case. (R. 69–77.) The taxpayer appealed in the Trust case. (R. 502–511.) The cases were con-

solidated on appeal (R. 82–84) and the Circuit Court of Appeals for the Eighth Circuit reversed the decisions of the Board in both cases (R. 543–544).

On May 10, 1940, the Corporation filed a petition for certiorari in this Court, which was denied on June 3, 1940.[2] On June 21, 1940, the Corporation filed a petition for rehearing of its petition for certiorari, which has not yet been acted upon by the Court.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Trust did not constructively receive income of $171,249.36 in the year 1932.

2. In reversing the decision of the Board of Tax Appeals.

REASON FOR GRANTING THE WRIT

This petition for certiorari is being filed solely to protect the Government's interests pending the action by this Court upon the petition for rehearing in the *Jane Holding Corporation* case, No. 999, last Term. We believe that the petition for rehearing should be denied in that case, and in the event of such denial we do not wish to press the petition in the instant case. However, if the petition for rehearing should be granted in the *Jane*

[2] *Jane Holding Corporation* v. *Helvering*, No. 999, October Term, 1939.

Holding Corporation case and the judgment below reversed in that case, then it would probably follow that the judgment below in the present case should likewise be reversed.

CONCLUSION

For the reasons above set out, it is respectfully submitted that this petition should be granted, if the petition for a writ of certiorari is granted in the case of *Jane Holding Corporation* v. *Helvering*, No. 999, October Term, 1939.

FRANCIS BIDDLE,
Solicitor General.

JULY 1940.

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